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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA

11 BRIAN DAVID MATTHEWS,

12 Plaintiff,

13 v.

14 JOSEPH LEHMAN, *et al.*,

15 Defendants.  
16

CASE NO. C07-5376RJB

REPORT AND  
RECOMMENDATION TO  
GRANT MOTION FOR  
SUMMARY JUDGMENT AND  
TO DISMISS COMPLAINT  
WITH PREJUDICE

Noted for June 26, 2009

17 This case has been referred to Magistrate Judge J. Richard Creatura pursuant to 28 U.S.C.  
18 § 636(b)(1)(B). This matter comes before the court on defendants' motion for summary  
19 judgment (Doc. 100) and plaintiff's motion to dismiss (Doc. 101). After reviewing both  
20 motions, the undersigned recommends that the court GRANT the motion for summary judgment  
21 and dismiss this matter with prejudice pursuant to Rule 56.  
22

23 ***DISCUSSION***

24 Under Rule 41 of the Federal Rules of Civil Procedure, a plaintiff has the right to  
25 voluntarily dismiss his case when no answer or motion for summary judgment has been filed by  
26 an adverse party. Fed. R. Civ. P. 41(a). Rule 41(a)(1) specifically provides that dismissal is a

1 matter of right, without a court order, which can be foreclosed only by the filing of an answer or  
2 a motion for summary judgment. Roddy v. Dendy, 141 F.R.D. 261, 262 (S.D. Mississippi,  
3 1992). Unlike Rule 41(a)(1) dismissal, Rule 41(a)(2) allows voluntary dismissal with court  
4 approval, and it is only effective "upon such terms and conditions as the court deems proper."  
5 Fed. R. Civ. P. 41(a)(2); Stevedoring Servs. of Am. v. Armilla Int'l B.V., 889 F.2d 919, 921 (9th  
6 Cir.1989). When ruling on a motion to dismiss without prejudice, the district court must  
7 determine whether the defendant will suffer some plain legal prejudice as a result of the  
8 dismissal. Hyde & Drath v. Baker, 24 F.3d 1162, 1169 (9th Cir.1994); Hamilton v. Firestone  
9 Tire & Rubber Co., 679 F.2d 143, 145 (9th Cir.1982)

11 In this case, defendants filed their motion for summary judgment on April 24, 2009 and  
12 noted it for consideration on May 22, 2009. (Doc. 100). On or about the date that plaintiff's  
13 response to the motion for summary judgment was due, plaintiff filed a motion to dismiss. (Doc.  
14 101). Plaintiff did not specify whether plaintiff was requesting with or without prejudice.  
15 Plaintiff filed no response to the motion for summary judgment. Defendants responded that they  
16 had no objection to plaintiff's motion to dismiss, so long as the complaint was dismissed with  
17 prejudice. Therefore, the court has two motions before it – a motion for summary judgment  
18 (which has not been withdrawn) and a motion to dismiss. For the reasons stated below, this  
19 court recommends that the motion for summary judgment be granted, making the motion to  
20 dismiss moot.

23 The Amended Complaint filed in this matter stated several causes of action against  
24 several different individuals, based on acts when Plaintiff was moved from his prison cell on or  
25 about on October 9, 2004. Plaintiff alleges prison officials entered his cell while he was sleeping  
26 with earplugs and used force to apply handcuffs. During the move, Plaintiff claims that he was

1 initially taken to a holding cell, and then taken out into a courtyard. In the courtyard, Plaintiff  
2 was allegedly placed on his stomach and his clothing was removed with scissors in the presence  
3 of at least one female officer. Specifically, Plaintiff claims defendants: (i) conducted an illegal  
4 search and seizure; (ii) used excessive force; (iii) inflicted cruel and unusual punishment; and  
5 (iv) violated Plaintiff's due process (both procedural and substantive) rights.  
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7 After consideration of Defendants' motion to dismiss (Doc. 73), a report and  
8 recommendation issued by Magistrate Judge J. Kelley Arnold (Doc. 76), the Court dismissed all  
9 but one cause of action – the alleged use of excessive force. Doc. 92. Addressing this final  
10 claim, on April 24, 2009, Defendants filed a motion for summary judgment (Doc. 100).  
11 Defendants' factual assertions supporting their motion for summary judgment explain the events  
12 leading up to Plaintiff's removal from his cell. Defendants' motion states:  
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14 Plaintiff, Brian David Matthews, DOC #769769, was incarcerated with the  
15 Washington State Department of Corrections but has since been released. At the  
16 time of the allegations contained in Plaintiff's Complaint, Plaintiff was  
17 incarcerated at the Stafford Creek Corrections Center in Aberdeen, Washington.  
18 Docket No. 71 at 3. On October 9, 2004, at approximately 10:30 p.m., the  
19 Plaintiff put a piece of mail in the mail box on his unit. Exhibit 2. The Plaintiff  
20 had second thoughts about sending that piece of mail and asked Defendant Jurasin  
21 if he could retrieve the mail from the otherwise locked box. Id. The Officer  
22 allowed the Plaintiff to remove the letter, but before he could verify that it was the  
23 letter that the Plaintiff had deposited in the mailbox, the Plaintiff absconded with  
24 it. Id. He ran to his cell and pretended to be asleep on his bunk clutching the letter  
25 underneath him. Id. Defendant Jurasin asked the Plaintiff a number of times to  
26 give the letter to him so he could verify that it was the Plaintiff's and had his  
DOC number on it. Id. Each time, the Plaintiff refused. Id. Failing to obey staff  
orders is a violation of DOC rules. Id.

23 When the Plaintiff refused to obey Defendant Jurasin's orders to give him  
24 the letter, Defendant Jurasin contacted Defendant Alvarado to provide back up  
25 and assistance with the Plaintiff. Id. The Defendants told the Plaintiff that he just  
26 needed to hand them the letter and they would not take any other action against  
him. Id. Instead of complying with this request, the Plaintiff remained  
unresponsive and motionless on his bed. Id. Sergeant Brewer was then called to  
assist with the matter. Id. Sergeant Brewer removed the Plaintiff's cellmate from  
the cell and closed the day room to further control the situation. Exhibit 4,

1 Declaration of Amanda Migchelbrink, Attachment A, Initial Serious Infraction  
2 Report dated September 9, 2004, signed by David Brewer. The Plaintiff was then  
3 asked to get up from his bunk and come out of his cell. Id. The Plaintiff sat up,  
4 looked at the Sergeant and laid back down, refusing to acknowledge the staff's  
requests. Id. It was then decided that staff would have to use force to obtain the  
Plaintiff's compliance with the orders. Id.

5 Defendants' Motion for Summary Judgment (Doc. 100) at 4-5.

6 When a motion for summary judgment is properly made, an opposing party may not rely  
7 merely on allegations in the complaint, but rather must present evidence showing a genuine issue  
8 of fact for trial. Fed. R. Civ. P. 56(e)(2). If the opposing party does not do so, then summary  
9 judgment should be granted against that party. Id. Additionally, Local Rule CR 7(b)(2) requires  
10 each party opposing summary judgment to file a response to the dispositive motion on the  
11 Monday immediately preceding the Friday appointed for consideration. Local Rule CR 7(b)(2)  
12 further states, "If a party fails to file papers in opposition to a motion, such failure may be  
13 considered by the court as an admission that the motion has merit."

15 Defendants have properly made a motion for summary judgment raising significant  
16 factual issues that would justify the granting of summary judgment. Since Plaintiff has not  
17 responded to the substantive claims raised in the motion for summary judgment, and further has  
18 expressed a desire to have the case dismissed, this court recommends that the motion for  
19 summary judgment be granted and the case be dismissed with prejudice.

21 The court further notes that although Plaintiff is currently represented by counsel,  
22 plaintiff was proceeding pro se for most of the case. The Ninth Circuit requires the court to warn  
23 pro se litigants of the possibility that a case may be dismissed on summary judgment if an  
24 opposition brief and sufficient evidence is not presented to the court. Rand v. Rowland, 113 F.3d  
25 1520 (9<sup>th</sup> Cir. 1997). In the court's order directing service (Doc. 5), plaintiff was appropriately  
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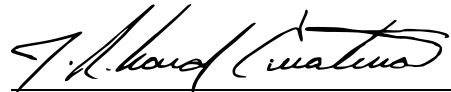
1 warned pursuant to Rand v. Rowland, 113 F.3d 1520 (9<sup>th</sup> Cir. 1997). Therefore, plaintiff's rights  
2 were well protected, both by counsel and by appropriate warning from the court.

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4 **CONCLUSION**

5 Based on the foregoing discussion, the court should GRANT defendants motion for  
6 summary judgment. Plaintiff failed to file any opposition to the motion for summary judgment,  
7 and thus, plaintiff's claims and causes of action should be dismissed with prejudice. Plaintiff's  
8 motion to voluntarily dismiss should be DENIED, as being moot.

9 Pursuant to 28 U.S.C. § 636(b)(1) and Rule 72(b) of the Federal Rules of Civil  
10 Procedure, the parties shall have ten (10) days from service of this Report to file written  
11 objections. *See also* Fed.R.Civ.P. 6. Failure to file objections will result in a waiver of those  
12 objections for purposes of appeal. Thomas v. Arn, 474 U.S. 140 (1985). Accommodating the  
13 time limit imposed by Rule 72(b), the clerk is directed to set the matter for consideration on June  
14 26, 2009, as noted in the caption.  
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16 DATED this 2<sup>nd</sup> day of June, 2009.

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19 J. Richard Creatura  
20 United States Magistrate Judge  
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